

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SHELTON RAMSEY MUSGRAVE,

Petitioner,

v.

JAMES SPALDING,

Respondent.

No. C04-2356Z

ORDER

This matter comes before the Court on Petitioner Shelton Musgrave's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, docket no. 1. The petition includes three grounds for relief:

(1) Petitioner's right to due process was violated by the exclusion of exculpatory evidence;

(2) Petitioner's right to confront witnesses against him was violated when the Petitioner was not permitted to cross-examine the State's sole witness to the homicide about his prior contacts with the police; and

(3) the cumulative effect of the state court's restrictions on the right to confront witnesses and prevent evidence rendered the Petitioner's trial fundamentally unfair.

2254 Petition, docket no. 1.

1 The petition was referred to United States Magistrate Judge Mary Alice Theiler. The
2 parties fully briefed the issues, docket nos. 5, 12 and 15, and Judge Theiler issued a Report
3 and Recommendation to this Court, docket no. 16. The Report and Recommendation
4 recommended that this Court deny the petition for writ of habeas corpus on the three grounds
5 presented. See Report and Recommendation at 14. The Petitioner concedes that he did not
6 exhaust his third ground for relief in state court. Petitioner's Reply, docket no. 12, at 1.
7 Petitioner objects to the Report and Recommendation's conclusions as to his first two
8 grounds for relief, docket no. 17. Because Petitioner objects to the Report and
9 Recommendation, the Court reviews the petition de novo. 28 U.S.C. § 636. The Court held
10 oral argument on Petitioner's objection on May 19, 2005. The Court has reviewed the briefs
11 and records filed herein and being fully advised, now enters the following order.

12 **BACKGROUND**

13 The Petitioner is a Washington state prisoner who has filed, through counsel, a
14 petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Petitioner was
15 convicted in state court, after a jury trial, of first degree murder. On appeal, the Washington
16 State Court of Appeals held that the trial court had erred in the suppression of certain
17 evidence, but that the error did not require reversal. Record, docket no. 9, Ex. 9, at 10 (State
18 of Washington v. Caffee).

19 The Petitioner and the Respondent, James Spalding, Superintendent of the
20 Washington State Reformatory, (hereinafter "State of Washington") generally agree on the
21 Washington State Court of Appeals recitation of the facts which the Court includes here:

22 On August 9, 1999, Shelton Musgrave, Jay Stewart, and Michael Caffee were under a
23 freeway overpass near Green Lake in Seattle when a homeless man named David
24 Ballenger was killed. The State charged Musgrave, Stewart, and Caffee with second
25 degree murder, but indicated it would amend the information to charge first degree
26 murder with a deadly weapon if the defendants went to trial.

1 Stewart cooperated with police officers and pleaded guilty to second degree murder,
2 receiving 204 months, within the standard range for second degree murder. Musgrave
3 decided to go to trial and was charged with murder in the first degree with a deadly
4 weapon enhancement, as well as the lesser included crimes of second degree murder,
5 and first and second degree manslaughter. Caffee agreed to plead guilty to first
6 degree manslaughter in return for his testimony at Musgrave's trial.

7 Caffee was the only eyewitness who testified at Musgrave's trial and provided the
8 following version of events:

9 On August 9, 1999, Will Allison and Jay Stewart visited Shelton Musgrave at his
10 apartment in Seattle. The three drank a case of beer. The young men then went to
11 Green Lake where they joined up with Caffee.

12 David Ballenger, a homeless man known to both Caffee and Musgrave, arrived where
13 the other men were located. Stewart started to argue with Ballenger. Both Allison
14 and Stewart then struck Ballenger. Neither Musgrave nor Caffee participated in this
15 initial assault. Allison left and attempted to lead Stewart away, but Stewart ran back
16 to find Ballenger and began kicking and hitting Ballenger.

17 When a bystander who saw the assault picked up a nearby pay phone, Stewart,
18 Caffee, and Musgrave all yelled at the bystander to hang up the phone. Caffee
19 threatened to beat up the bystander, and Musgrave advised the bystander to leave.
20 The man left, but by then Ballenger had escaped. Police officers arrived and asked
21 the three individuals if they knew anything about a fight. Stewart, Caffee, and
22 Musgrave denied knowledge or participation.

23 Stewart demanded to know where Ballenger was, and Musgrave eventually led
24 Stewart and Caffee to the freeway overpass where Ballenger made his "camp."
25 Stewart began choking and hitting Ballenger. Musgrave then began kicking Ballenger
26 from behind. Stewart approached Caffee and demanded Caffee's knife. Caffee gave
it to him only after repeated requests. Stewart used the knife to stab Ballenger and
Musgrave used the knife to cut off Ballenger's sweater. Stewart set Ballenger's
sweater on fire and threw it into Ballenger's bedding. Caffee testified Ballenger made
a sound that Caffee described as lungs "deflating." Caffee stated he thought
Ballenger was dead, but that Musgrave continued to stab Ballenger.

Throughout his testimony, Caffee described his role in Ballenger's death as a
reluctant bystander. Caffee explained that during the events he was standing near a
freeway support pillar and away from the others, who were under the overpass,
watching as the events unfolded. Caffee also testified that he moved around during
the events, from behind the pillar to a fence near the overpass, and that Stewart and
Musgrave moved around as they attacked Ballenger. After the attack, Stewart returned
the knife to Caffee, and Caffee placed the knife in his back pocket. Stewart,
Musgrave, and Caffee then left and went back to Musgrave's apartment. Caffee
testified that both Stewart and Musgrave threatened to kill anyone who told anyone
what happened. . . .

Caffee testified that he pretended to discover Ballenger's body the next day. Police
officers were called, and when they arrived Caffee denied any participation in the
crime. Caffee was later interviewed and he again denied participation in the crime.

1 Caffee later admitted to police officers that he was present when Ballenger was killed,
2 but stated that Stewart and Musgrave were the primary aggressors.

3 At trial, a medical examiner testified that Ballenger had suffered 18 stab wounds as
4 well as 5 rib fractures that could have been inflicted by a forceful kick with a heavy
5 boot. The State also introduced into evidence Musgrave's steel-toed boots, which had
6 blood matching Ballenger's DNA (deoxyribonucleic acid) profile on them.

7 Musgrave's left boot exhibited an airborne pattern of droplets, while his right boot
8 contained a blood stain diffused over a large area that was consistent with a contact
9 transfer. The patterns of blood on the boots suggested that the right boot forcefully
10 came into contact with the blood source and that the left boot was close to the vicinity
11 where the impact with the blood source occurred. Blood consistent with Ballenger's
12 DNA profile was also found on Caffee's left rear pants pocket

13 Also prior to trial, both State and defense attorneys noted that neither Musgrave nor
14 Caffee had prior criminal convictions and agreed not to introduce evidence of either
15 of the defendants' "teenage history" of "potentially illegal or inappropriate" acts
16 under ER 404(b). Musgrave's attorney stated that if Caffee opened the door in some
17 obvious way, such as stating, "I've never had contact with the police" or "I've never
18 been in trouble before," she would seek to introduce such evidence of inappropriate
19 acts on the issue of Caffee's credibility. The State commented that it was unaware of
20 any acts by Caffee other than smoking cigarettes at school; possibly writing his name
21 in cement; or bragging with Musgrave about "macing bums," and asked for an offer of
22 proof about other acts. Defense counsel replied that it was premature and the court
23 agreed.

24 During the course of Caffee's direct examination, after he testified about how he had
25 initially lied to police officers, the prosecutor asked Caffee how he felt about talking
26 to police officers about the murder. Caffee responded:

I was still pretty scared. I don't know, I've never had any real, like, connection
with the law before. I've never made any--done anything seriously legal [sic]
to get me in trouble, so I've never dealt with the police in a situation like this.
And I was, like, kind of scared of what could happen.

27 Caffee then admitted that he also lied to police officers when they interviewed him at
28 the police station, stating several times that he was trying to be "loyal" to his friend
29 Musgrave.

30 Four days after Caffee's comments, Musgrave's counsel argued that Caffee's
31 testimony was a "material misrepresentation," and that Caffee had opened the door to
32 impeach the impression that he was a naïve, frightened young man who didn't have
33 the experience to lie to police officers. Defense counsel stated that Caffee had been
34 arrested and questioned for prowling around bikes; stealing bike parts; graffiti;
35 possession of illegal fireworks; and smoking marijuana in public. The State countered
36 that Caffee qualified his testimony and noted that the State did not have any record of
37 Caffee's alleged prior contacts with law enforcement. The court did not allow
38 admission of evidence of prior conduct, stating that the defense had "full and adequate
39 opportunity" to impeach Caffee regarding his fabrications and would continue to have
40 opportunities to impeach Caffee about his misrepresentations to police officers.

41 After Caffee finished testifying, defense counsel also sought to introduce testimony
42 and photographs by a defense investigator. Defense argued the purpose of the
43 testimony and photographs was to impeach Caffee's testimony regarding his version

1 of events by showing that Caffee could not have seen what he claimed to have seen
2 from his vantage point. The trial court stated that it would not allow the testimony or
3 photographs, but offered to allow the defense an opportunity to lay a foundation for
4 the introduction of the photographs by recalling Caffee to the stand to determine if
5 they were accurate representations of where he was standing and what he saw.
6 Defense counsel declined to do so and did not further discuss the issue.

7 Record, docket no. 9, Ex. 9, at 2-4 (State of Washington v. Caffee). The jury convicted
8 Petitioner of first degree murder with a deadly weapon enhancement. Id. The Petitioner
9 appealed his conviction. The Washington State Court of Appeals affirmed the Petitioner's
10 conviction, but held that the trial court's exclusion of the defense investigator's testimony
11 and photographs was "evidentiary error." Although the court held that this exclusion was
12 error, it concluded that "it was unclear on the record that this evidence, had it been admitted,
13 would have changed the outcome of the trial." Record, Ex. 9, at 10 (State of Washington v.
14 Caffee). The Washington Supreme Court denied review. The Petitioner filed this petition on
15 November 22, 2004.

16 DISCUSSION

17 1. Standard

18 Under the Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d), a
19 petition for a writ of habeas corpus may be granted with respect to any claim adjudicated on
20 the merits in state court only if the state court's adjudication was contrary to, or involved an
21 unreasonable application of, clearly established federal law as determined by the Supreme
22 Court of the United States. 28 U.S.C. § 2254(d). Under the "contrary to" clause, a federal
23 habeas court may grant the writ only if the state court arrives at a conclusion opposite to that
24 reached by the Supreme Court on a question of law, or if the state court decides a case
25 differently than the Supreme Court has on a set of materially indistinguishable facts.
26 See Williams v. Taylor, 529 U.S. 362, 412-13 (2000). Under the "unreasonable application"
clause, a federal habeas court may grant the writ only if the state court identifies the correct
governing legal principle from the Supreme Court's decisions, but unreasonably applies that
principle to the facts of the prisoner's case. Id. In addition, a habeas corpus petition may be

1 granted if the state court decision was based on an unreasonable determination of the facts in
2 light of the evidence presented. 28 U.S.C. § 2254(d).

3 When analyzing a claim that there has been an unreasonable application of federal
4 law, the court first asks whether the state court erred. DePetris v. Kuykendall, 239 F.3d
5 1057, 1061 (9th Cir. 2001). Only then does the court consider whether any error involved an
6 unreasonable application of controlling law or was contrary to federal law. Id. An error is
7 only an unreasonable application of controlling federal law or contrary to federal law if it is
8 objectively unreasonable, not merely clearly erroneous. Lockyer v. Andrade, 538 U.S. 63,
9 75 (2003). Finally, the Court applies the standard articulated in Brecht v. Ambrahamson,
10 507 U.S. 619, 638 (1993), to determine whether a constitutional error was harmless. Habeas
11 relief is warranted only if the error had a “substantial and injurious effect or influence in
12 determining the jury’s verdict.” Id.¹

13 **2. Exclusion of Evidence**

14 The Washington Court of Appeals held that the exclusion of the defense investigator’s
15 testimony and photographs at trial was error and that finding is binding on this Court.
16 DePetris, 239 F.3d at 1061-62. The State of Washington does not challenge this finding.
17 The Court must determine whether the erroneous evidentiary ruling was contrary to, or an
18 unreasonable application of, clearly established federal law as determined by the Supreme
19 Court, and if so, whether the error was also “objectively unreasonable.” 28 U.S.C.
20 § 2254(d); Lockyer, 538 U.S. at 75. If the error was “objectively unreasonable,” the Court
21 then must inquire whether it had a substantial and injurious effect on the jury’s verdict.
22
23

24 ¹Petitioner argues that the Court should apply the harm standard articulated in Orndorff v.
25 Lockhart, 998 F.2d 1426, 1430 (8th Cir. 1993), when reviewing the harm an error caused the
26 Petitioner. As Petitioner acknowledges, however, this standard was specifically rejected by
the Ninth Circuit for federal courts in habeas cases. Bains v. Cambria, 204 F.3d 964, 977
(9th Cir. 2000).

1 **a. Was one of the Petitioner's constitutional rights violated?**

2 The facts of this case are very similar to those of Franklin v. Henry, 122 F.3d 1270,
3 1273 (9th Cir. 1997), overruled on other grounds by, Payton v. Woodford, 299 F.3d 815 (9th
4 Cir. 2002) and DePetris v. Kuykendall, 239 F.3d 1057 (9th Cir. 2001). In Franklin, the state
5 trial court excluded testimonial evidence by the defendant that his alleged victim, a child,
6 had accused her mother of molesting her in the same way that she accused the defendant of
7 molesting her. 122 F.3d at 1272. The jury convicted Franklin of sexual abuse and he
8 appealed his conviction. The California appellate court ruled that the trial court had erred in
9 excluding the evidence as to the child's accusations about her mother. Id. (citing People v.
10 Franklin, 25 Cal. App. 4th 328, 30 Cal. Rptr. 2d 376 (1994)). The California appellate court
11 concluded that the exclusion of this evidence did not result in a miscarriage of justice
12 because the function of the excluded testimony was to impeach the complaining child's
13 credibility and ample evidence for that purpose was placed before the jury. The court cited
14 evidence of the child's dream about her mother and defendant kissing, evidence that she
15 altered her testimony to accommodate her mother's sensitivity, and evidence from which the
16 jury could infer that the child had access to the Playboy channel. Id. The Supreme Court of
17 California denied review. Franklin filed a petition for habeas corpus in the Federal District
18 Court for the Northern District of California contending that he had been denied due process
19 of law under the federal constitution. The federal district court held that the error of the state
20 trial court did not have "a substantial and injurious effect" on the jury's verdict. On appeal
21 the Ninth Circuit reversed. The Ninth Circuit held that the state trial court's error was of
22 constitutional magnitude because it bore on the credibility of the only percipient witness to
23 the events. Id. at 1273. The Franklin court was unsure of the effect of the exclusion, holding
24 that "[i]n grave doubt as to the effect of the error" it must direct the district court to grant the
25 petition. Id.

26

1 In DePetrìs, the petitioner was convicted in California state court of first degree
2 murder in the shooting death of her sleeping husband. 239 F.3d at 1058. At trial in state
3 court, the petitioner claimed imperfect self defense – an actual, honest, even if unreasonable,
4 belief that she was in imminent danger. To prove this defense, she sought to have her
5 husband’s handwritten journal admitted into evidence. She also wished to testify about how
6 having read the journal contributed to her belief that her husband’s threats were serious. Id.
7 at 1059. The journal contained her husband’s account of his violent behavior towards his
8 first wife and others. Id. The state trial court excluded as irrelevant the journal and
9 petitioner’s testimony about having read it. Id. The California appellate court held that the
10 journal was admissible as a matter of California law and the trial court had erred by
11 excluding it, but concluded that the error was harmless because the jury had heard other
12 evidence relating to the petitioner’s husband’s propensity for domestic violence. Id. The
13 petitioner filed a petition for writ of habeas corpus in the Federal District Court for the
14 Northern District of California. The federal district court denied habeas relief, holding that
15 the excluded evidence was but “one piece of physical evidence” that was not critical to the
16 defense. Id. at 1061. On appeal the Ninth Circuit disagreed and held that the error was of
17 constitutional magnitude as the petitioner’s testimony about having read the journal and its
18 effect on her went to the heart of her claim of imperfect self-defense. Id. at 1062-63. The
19 DePetrìs court held that the exclusion of the journal and testimony had a substantially
20 injurious effect on the jury’s verdict. Id. at 1063-65. The court held the excluded evidence
21 went directly to the petitioner’s state of mind and her credibility. Id.

22 The Petitioner argues that, as in Franklin and DePetrìs, the erroneous exclusion of
23 evidence in this case was contrary to clearly established federal law. Petitioner’s Objections,
24 docket no. 17, at 6. The Petitioner argues that the excluded investigator’s testimony and
25 photographs were critical to his defense because they would have discredited Caffee and the
26 jury had to believe Caffee in order to convict him.

1 The record supports the Petitioner's argument. Caffee testified that he was at three
2 different vantage points during the incident. At the first vantage point, Caffee testified that
3 he stood under the freeway, behind a pillar, looking up a steep incline towards Ballenger's
4 camp. Record, docket no. 11, Ex. 28, at 1172-74. Caffee testified that he then moved
5 around the pillar, up the path to his second vantage point at a grassy area outside of the
6 freeway against a fence. Id. Ex. 30, at 1325-27. Caffee testified that he moved from that
7 location to a third vantage point under the freeway when the other two men involved in the
8 incident, Petitioner and Jay Stewart, moved the body. Id., Ex. 30, at 1338-40.

9 Both parties agree that what Caffee could see from the second vantage point was
10 critical to his testimony. Caffee testified it was from the second vantage point that he
11 witnessed the crucial aspects of the homicide. See id. at 1336-38. Caffee testified that from
12 this second vantage point he watched Petitioner stab Mr. Ballenger. Id. at 1337-38.
13 Petitioner argues that the evidence erroneously excluded at trial would have demonstrated
14 that Caffee could not have seen the homicide from his second vantage point. This evidence,
15 like the evidence excluded in Franklin, goes directly to the credibility of the only percipient
16 witness. Where a defendant's guilt hinges largely on the credibility of a prosecution's
17 witness, then the erroneous exclusion of evidence critical to assessing the credibility of that
18 witness violates the Constitution. DePetris, 239 F.3d at 1062 (citing Franklin, 122 F.3d at
19 1273).

20 Despite the significance of the evidence excluded, this case can be distinguished from
21 Franklin and DePetris in at least one way. At the Petitioner's trial, while the trial judge did
22 not allow the Petitioner to offer the photographs and testimony through the defense
23 investigator, the trial judge did offer to allow the Petitioner to lay the foundation for the
24 photographs by recalling Caffee to the witness stand and ascertaining whether the
25 photographs were accurate representations of the view from where Caffee was standing
26 during the homicide. Record, Ex. 32, at 1767-68. The Petitioner declined to do so. In

1 neither Franklin nor DePetrìs were the petitioners offered alternative means to offer the
2 excluded evidence. Despite this option, the Washington Court of Appeals held that the
3 trial court erred in not allowing the Petitioner to offer the defense investigator's testimony
4 and photographs through the investigator. Record, docket no. 9, Ex. 9, p. 10.

5 In certain situations, an opportunity to admit evidence through an adverse witness is
6 no opportunity at all. This is one of those situations. Caffee had agreed to plead guilty to
7 first degree manslaughter in return for his testimony at Musgrave's trial. Id. at 2. Thus,
8 Caffee had an incentive to bolster his testimony against Musgrave. As the State of
9 Washington acknowledged at oral argument, had Caffee been called to testify regarding the
10 photographs, he most likely would have stated that they did not accurately represent where
11 he was standing, despite his previous testimony placing him where the photographs were
12 taken. Further, without the testimony of the defense investigator regarding where she was
13 standing when she took the pictures, the trial court may not have had the foundation it
14 needed to admit the photographs at all. Finally, Petitioner's right to assistance of counsel
15 means "that there can be no restrictions upon the function of counsel in defending a criminal
16 prosecution in accord with the traditions of the adversary factfinding process that has been
17 constitutionalized in the Sixth and Fourteenth Amendments." Herring v. New York, 422
18 U.S. 853, 857 (1975). This includes restrictions on defense counsel's right to make tactical
19 decisions on how to best offer admissible evidence. See Brooks v. Tennessee, 406 U.S. 605,
20 612-13 (1972) (striking down a Tennessee statute requiring the Defendant in a criminal case
21 to testify before any other testimony for the defense is heard, in part as a violation of the due
22 process right to have the assistance of the "guiding hand of counsel"). As it is undisputed
23 that the excluded evidence was admissible through the investigator, the Petitioner should
24 have been able, within reasonable limits, to offer that evidence through the means his
25 counsel thought most advantageous to his defense.

1 The similarity of the facts of this case with those of DePetris and Franklin is not
2 undermined by the trial judge's offer to let the Petitioner recall Caffee in order to lay the
3 foundation for the defense investigator's photographs. Instead, the exclusion of the defense
4 investigator's testimony and photographs denied the Petitioner the ability to effectively
5 challenge the credibility of the crucial witness to the crime. This unconstitutionally
6 interfered with the Petitioner's ability to defend himself against the charges brought against
7 him. See DePetris, 239 F.3d at 1065. The Court holds that this failure on the part of the trial
8 court was not merely erroneous, but objectively unreasonable. See Lockyer, 538 U.S. at 75.
9 This was an error of constitutional magnitude.

10 **b. Did the exclusion have a substantial and injurious effect on the jury's**
11 **verdict?**

12 Having concluded that the exclusion of the evidence at issue was an error of
13 constitutional magnitude, the Court must next determine whether the exclusion had a
14 "substantial and injurious effect" on the jury's verdict. See Brecht, 507 U.S. at 638. The
15 Court concludes that it did.

16 Caffee was the only eyewitness to testify against the Petitioner and the State relied
17 heavily on his testimony. In fact, the State of Washington acknowledged at oral argument
18 that Caffee was the only source of evidence at trial that put a knife in the Petitioner's hand.
19 However, the State of Washington argues that blood evidence clearly showed that Petitioner
20 participated in the murder, rendering Caffee's testimony less critical. The State of
21 Washington's blood pattern expert, Mr. George Chan, testified that after examining the
22 Petitioner's boots, he concluded that "the impact spatter droplets and the contact transfer
23 pattern on the right boot suggest that the boot forcefully came into contact with the blood
24 source," i.e., Mr. Ballenger's body. Record, docket no. 11, Ex. 31, at 1567. Further, "[t]he
25 small blood deposits on the left boot suggest that the left boot was close to the vicinity when
26 impact to the blood source occurred." Id. at 1568. Mr. Chan went on to testify that the

1 blood spatter patterns were consistent with the scenario that the person wearing the boots
2 kicked the blood source. *Id.* at 1576. However, on cross-examination, Mr. Chan admitted
3 that there was no scientific way to determine if the blood stains on the Petitioner's boots
4 were the result of one event or multiple events, or if the blood source was the victim's body
5 or some other place where his blood was deposited, such as a knife or a bloodied shirt. *Id.* at
6 1579-82, 1607. Given the lack of a definitive explanation for the blood patterns on the
7 Petitioner's boots, Caffee's testimony, and thus his credibility, emerge as the lynchpin of
8 both the State's case against the Petitioner and the Petitioner's defense. The Court finds that
9 the Petitioner's inability to offer evidence directly relevant to the question of Caffee's
10 credibility had a "substantial and injurious effect" on the jury's verdict and GRANTS IN
11 PART the Petitioner's petition for a writ of habeas corpus under 28 U.S.C. § 2254 based on
12 the state trial court's exclusion of the defense investigator's testimony and photographs.

13 **3. Restriction on Cross-Examination**

14 The Petitioner's second objection to the Report and Recommendation involves its
15 conclusion that Petitioner's inability to cross-examine Caffee on his prior contacts with the
16 police was not unreasonable. The Petitioner argues that this restriction was unreasonable
17 because cross-examination would have demonstrated that Caffee had experience with the
18 police and that his initial untruthful statements to the police were a deliberate effort to get
19 away with murder. Petitioner's Objections, at 21.

20 The Court concludes that the Report and Recommendation's analysis is correct. At
21 trial, Caffee admitted that he had lied to the police. Therefore, the Petitioner need not have
22 demonstrated that Caffee had prior contact with the police to show that he was fully capable
23 of lying to the police. Further, Caffee's testimony was that he had not had any "real" or
24 "serious" contact with the police, not that he had not had any contact. Therefore, Caffee's
25 statement was not inaccurate and could not have been impeached by a cross-examination
26 based on prior, minor run-ins with the police. The Court ADOPTS the Report and

1 Recommendation with respect to Musgrave's second ground for relief: inadequate
2 opportunity to cross examine Caffee and DENIES IN PART the Petitioner's petition for a
3 writ of habeas corpus on this ground.

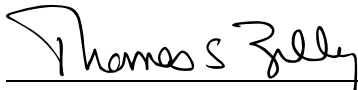
4 **CONCLUSION**

5 The Court GRANTS Shelton Musgrave's petition for a writ of habeas corpus based on
6 the exclusion of the defense investigator's testimony and photographs. The Court ADOPTS
7 the Report and Recommendation's conclusion dismissing Petitioner's second ground for
8 relief, that his limited cross-examination of the State's witness violated his right to confront
9 the witnesses against him. The Court ADOPTS the Report and Recommendation's
10 conclusion dismissing Petitioner's third ground for relief, that the cumulative effect of the
11 state court's restrictions impinged on his right to a fair trial.

12 The Court DIRECTS the Petitioner to file within 10 days of the date of this Order a
13 proposed judgment granting the petition for writ of habeas corpus in accordance with this
14 Order. The State of Washington shall have 10 days from the date Petitioner's proposed
15 judgment is filed to file any opposition to the proposed judgment.

16 IT IS SO ORDERED.

17 DATED this 24th day of June, 2005.

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20 Thomas S. Zilly
21 United States District Judge
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